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PSYCHIC INJURY AND THE BYSTANDER: THE TRANSCONTINENTAL DISPUTE BETWEEN CALIFORNIA AND NEW YORK

ANDREW J. SIMONS*

INTRODUCTION

California and New York were actually and symbolically joined by the meeting of the Southern Pacific Railroad and the Union Pacific Railroad at Promontory, Utah in 1869. Although the connection was transcontinental, it did not prove to be juridically transcendental, for the centennial of that historic event found the high courts of the two states embroiled in a jurisprudential debate on a significant and topical issue: Should a bystander be allowed to recover for psychic injury caused by traumatic shock upon witnessing a negligent tortfeasor's infliction of bodily harm upon a third person? After literally decades of negative responses,[1] the California Supreme Court in 1968 became the first court of last resort in this country to hold that a mother's mental and physical injuries, caused solely by the psychic trauma of observing her small child injured by the negligence of a tortfeasor, were compensable in damages.[2] Faced with very similar circumstances, the New York Court of Appeals in 1969 expressly rejected the California view and held that under no circumstances could such injuries be legally cosidered the actionable fault of the tortfeasor.[3]

In the years since these two landmark cases were decided, much has been written about the wisdom and prudence of the seemingly contradictory approaches taken by the two courts, about the reasoning and logic employed by them, and about the fairness and justice

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[1] *See, e.g.*, Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[2] Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[3] Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

of the two decisions.[4] Several states have followed California's lead,[5] while others have shared New York's reluctance to do so.[6] The purpose of this Article is to analyze the current state of the debate on this issue in order to determine whether the two approaches are in fact irreconcilable, or whether there is an aspect of this issue upon which these two highly respected state courts might agree, a focal point from which a consensus may be initiated.

As an aid in considering the multifaceted legal, medical, and psychological aspects of the issue, it is helpful to pose the following Stated Hypothetical to which reference shall be made throughout this Article:

> Driver and Parent are socializing on the front stoop. Parent's three-year-old child is playing nearby. Driver gets into his car in the driveway to leave and negligently backs the vehicle over the child who is running to say goodbye to Driver. Driver is negligent by looking at and waving goodbye to Parent without watching the direction the car is traveling. While Driver is watching Parent, the latter's scream alerts Driver to the accident but the child is killed. Parent was not endangered by the motor vehicle, but suffers severe psychosomatic injury from witnessing infliction of the child's fatal injuries.

If Parent sues Driver, will recovery for all injuries, mental and physical, be allowed? In California, yes; in New York, no. Should recovery be allowed? The answer can be yes, without completely rejecting New York's tempered reluctance or completely accepting California's restrained enthusiasm.

Dillon & Tobin: An Historical Analysis

The conflict of judicial approaches taken on the issue of a bystander's recovery for psychic injury resulting from having witnessed physical injury negligently inflicted upon another is epitomized by the decisions of the California Supreme Court in *Dillon v. Legg*[7] and of the New York Court of Appeals in *Tobin v.*

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[4] *See, e.g.*, W. Prosser, Law of Torts § 54, at 334-35 (4th ed. 1971); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo. L.J. 1237, 1246 (1971).

[5] *See, e.g.*, D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (Ct. App. 1973); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975).

[6] *See, e.g.*, Welsh v. Davis, 307 F. Supp. 416 (D. Mont. 1969); Whetham v. Bismarck Hosp., 197 N.W.2d 678 (N.D. 1972).

[7] 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

Grossman.[8] A full understanding of these cases is necessary in order to analyze this perplexing and topical issue. At the outset, it is interesting to note that the *Dillon* and *Tobin* cases were enmeshed in the appellate process simultaneously, each affecting the other to some extent. This curious interrelationship renders the contrary determinations of the two courts all the more significant.

The California Supreme Court in *Dillon* was the first state court of last resort to allow recovery to the witness of a negligent act, and in so doing overruled *Amaya v. Home Ice, Fuel & Supply Co.*,[9] in which the identical issue had been raised only five years earlier. The intermediate appellate court in *Amaya,* in a well-reasoned opinion by Justice Tobriner, traced the historical reluctance of the courts to allow a bystander, not in the zone of physical harm or fearful for his own safety, to recover for emotional injuries suffered from observing the negligent infliction of physical injury upon another.[10] After examining the relationship of duty and foreseeability, and the difficulty of resolving the issue in terms of those traditional tort concepts, Justice Tobriner discussed the five objections which generally have stood in the way of a plaintiff's recovery: absence of impact; plaintiff's absence from the zone of physical danger; judicial reluctance to award damages for emotional distress; absence of fear of injury to self rather than to another; and the potential flood of litigation and unfounded claims. After thoughtfully considering each of these issues, Justice Tobriner concluded that such objections were no more than judicially devised theories to limit the liability of a tortfeasor. The justice stated: "We are sympathetic with courts which do not believe that redress should be afforded for the flutter of every heart at the sight of an accident. But the need for delineating the area of liability does not justify the obliteration of the liability."[11] The intermediate court in *Amaya* then adopted Dean Prosser's proposal to allow recovery in the limited circumstances where traumatic shock occurs with resulting physical injuries from observing the negligent infliction of serious physical injury upon a close relative.[12] In so doing, the court eloquently threw down the gauntlet to those who would deny recovery:

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[8] 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

[9] 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), *rev'g* 23 Cal. Rptr. 131 (Ct. App. 1962).

[10] 23 Cal. Rptr. at 133-35.

[11] *Id.* at 140.

[12] Justice Tobriner quoted Dean Prosser's famous treatise:

It is clear that the injury threatened or inflicted upon the third person must be a

> It is not consonant with the reactions, or the mores, of the society of today to hold that the mother who suffers emotional distress upon the sight of her child's injury should not recover if the trier of fact finds such injury was reasonably foreseeable. The knowledge of potential emotional trauma to a parent who witnesses an injury to a child is too clear to the negligent driver to permit an escape upon the ground of unforeseeability. In this time of death and danger on the highway, it would be anachronistic to grant immunity to the negligent driver for such foreseeable emotional disturbance upon the basis of legal abstractions that do not relate to the issuance of the case.[13]

Justice Tobriner (and, unfortunately, Mrs. Amaya) would have to wait five more years before this rationale would become law in California, however, for the state supreme court, by a narrow margin, adhered to the traditional concept of nonliability based, *inter alia,* upon the reasons rejected in the intermediate court's opinion.[14]

When the identical issue was later presented in *Dillon,* however, the California Supreme Court overruled *Amaya* by a slim majority in a landmark opinion written by Justice Tobriner, who had since been appointed to the higher court, in which he adopted verbatim portions of his earlier opinion in *Amaya.*[15] The *Dillon* majority, realizing that it was breaking new ground in United States tort law, relied principally upon legal scholars and several English cases.

Stating the issue much more narrowly than had been done in

> serious one, of a nature to cause severe shock to the plaintiff, and that the shock must result in actual physical harm. The action might well be confined to members of the immediate family, or perhaps to husband, wife, parent or child, to the exclusion of bystanders, and remote relatives. As an additional safeguard, it has been said that the plaintiff must be present at the time of the accident, or at least that the shock must be fairly contemporaneous with it, rather than follow at a later date. Admittedly such restrictions are quite arbitrary, but they may be necessary in order not to "leave the liability of a negligent defendant open to undue extension by the verdict of sympathetic juries, who under our system must define and apply any general rule to the facts of the case before them." Within some such limits, it is still possible that a rule imposing liability may ultimately be adopted.

Id., quoting W. PROSSER, LAW OF TORTS 182 (2d ed. 1955)(footnotes omitted).

[13] 23 Cal. Rptr. at 140-41.

[14] Justice Tobriner subsequently became a member of the California Supreme Court at the time the *Amaya* case was considered by that court, but of course did not participate in the decision.

[15] While the jurisprudential propriety of a change in a court's composition resulting in the overruling of its own recent decision is not an appropriate issue to be discussed herein, it is noteworthy that the dissenting opinions in *Dillon* strongly relied upon *Amaya* and perceived no reason for overruling its determination. 68 Cal. 2d at 748, 441 P.2d at 925, 69 Cal. Rptr. at 85 (Traynor, C.J. & Burke, J., dissenting). *See also* Simpson v. Loehman, 21 N.Y.2d 305, 314, 234 N.E.2d 669, 674, 287 N.Y.S.2d 633, 640 (1967) (Breitel & Bergan, JJ., concurring).

Amaya,[16] the *Dillon* court overruled its earlier decision, basing its determination upon the existence of a duty owed by the negligent driver to the mother because of the proximity of the mother to the scene of the accident, her sensory and contemporaneous observance of the child's injuries, and the close relationship between mother and child. A simple and traditional standard of tort law was found sufficient to allow recovery: What would the ordinary person under such circumstance have reasonably foreseen? To the *Dillon* court, the answer was clear: "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma."[17]

While this legal drama was unfolding on the west coast, a similar struggle was being waged in the East. How strange it is that the same significant issue of law should be scrutinized by the courts of two of the leading jurisdictions in the country at the same time! In the New York case, the plaintiff had allegedly suffered severe shock causing mental and emotional illness when she witnessed the defendant strike her infant child with his motor vehicle. On June 28, 1968, the Appellate Division, Third Department, unanimously dismissed the case, relying expressly upon the rationale of the 1963

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[16] According to the *Amaya* dissent:

> The majority opinion states the issue to be "whether liability may be predicated on fright or nervous shock (with consequent bodily illness) induced solely by the plaintiff's apprehension of negligently caused danger or injury to a third person." So stated, the answer to such a broad question might well be in the negative. But the issue now before us is not the one quoted above. The real issue is a much more limited one. The plaintiff is not just anyone. She is a *mother* of a 17-month-old *infant child.* The defendant, *in the presence of the mother,* negligently ran down and injured that *infant child.* As a proximate result the mother has suffered permanent injuries. Thus the real question is not the one stated by the majority, but is whether or not a mother may recover damages for physical injuries resulting from emotional shock caused by fear for her infant child who is negligently run down by the automobile of the defendant in the presence of the mother. I submit that the answer to that question, so limited, should be that liability for such injuries should exist.

59 Cal. 2d at 315-16, 379 P.2d at 525-26, 29 Cal. Rptr. at 45-46 (1963) (Peters, J., dissenting) (emphasis in original).

The *Dillon* court phrased the issue in language similar to that proposed by Justice Peters in *Amaya*, declaring:

> That the courts should allow recovery to a mother who suffers emotional trauma and physical injury from witnessing the infliction of death or injury to her child for which the tort-feasor is liable in negligence would appear to be a compelling proposition.

68 Cal. 2d at 730, 441 P.2d at 914, 69 Cal. Rptr. at 74.

[17] 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81. *See also* 2 F. HARPER & F. JAMES, TORTS § 18.4, at 1039 (1956); W. PROSSER, LAW OF TORTS § 54, at 334 (4th ed. 1971).

Amaya decision of the California Supreme Court.[18] Ironically, and most assuredly unbeknownst to the appellate division, exactly one week previously, on June 21, 1968, the California Supreme Court in *Dillon* had expressed overruled *Amaya*[19] and permitted liability to be assessed against the tortfeasor.

Thus, the battle lines were drawn and the issue squarely placed before the New York Court of Appeals. In April 1969, "against a background of top-heavy precedential authority and doctrine denying a cause of action"[20] in such a case, that court in *Tobin* expressly rejected the *Dillon* rationale.[21] After analyzing the many relevant factors, *e.g.*, "foreseeability of the injury, proliferation of claims, fraudulent claims, inconsistency of the zone of danger rule, unlimited liability, unduly burdensome liability, and the difficulty of circumscribing the area of liability,"[22] the court concluded that the last factor proved to be an insurmountable obstacle for the plaintiff. The limiting conditions suggested by Dean Prosser and adopted in *Dillon* were rejected since the court found that such strictures neither placed a strict rein on liability nor provided a reasonably objective test.[23]

How would the *Dillon* and *Tobin* courts decide the Stated Hypothetical proposed at the outset of this Article? *Dillon* would manifestly allow recovery; *Tobin* would appear to dictate nonliability, although recent case law in New York may render such a result less predictable.[24] Before reviewing the newer cases, however, the several

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[18] Tobin v. Grossman, 30 App. Div. 2d 229, 291 N.Y.S.2d 227 (3d Dep't 1968), *aff'd*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969), *rev'g* 55 Misc. 2d 304, 284 N.Y.S.2d 997 (Sup. Ct. Albany County 1967).

[19] 68 Cal. 2d at 748, 441 P.2d at 925, 69 Cal. Rptr. at 85.

[20] 24 N.Y.2d at 612, 249 N.E.2d at 420, 301 N.Y.S.2d at 555.

[21] *Id.* at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

[22] *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558.

[23] According to Judge Breitel:

> While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.

Id. at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62. In his dissenting opinion in *Tobin*, the late Judge Keating dismissed the majority's concern about "unlimited liability" as "rationalization" and stated that "essential justice" would permit recovery when there has been a finding of a worthy protectable interest, foreseeability, proximate causality, and actual injury. *Id.* at 620, 249 N.E.2d at 425, 301 N.Y.S.2d at 562-63 (Keating, J., dissenting).

[24] *See* notes 155-71 and accompanying text *infra*.

factors discussed in *Dillon* and *Tobin* as reasons for thwarting the bystander's recovery for negligently induced psychic injuries should be analyzed to determine their current relevance and persuasive value.

FACTORS MILITATING AGAINST BYSTANDER RECOVERY

1. *The Impact Limitation*

Until recently, in New York and most other jurisdictions, the Parent in the Stated Hypothetical would have been unable to recover, not only because he was outside the zone of danger or fearful for another, but simply because there was no physical "impact" between Parent and Driver, no physical intrusion upon Parent's person.[25] The fundamental reasons for the impact requirement are in many respects similar if not identical to those generally cited as weighing against recovery in psychic injury cases involving bystanders. The considerations underlying the impact requirement are: (1) mere fright should not provide a basis for recovery; (2) physical injury psychically induced is a remote, rather than a proximate, effect of the tortfeasor's negligence; (3) public policy requires nonliability lest the courts be inundated with unduly burdensome litigation and speculative and false claims.[26]

The first two objections "have been demolished many times, and it is threshing old straw to deal with them."[27] The third, a recurring fear expressed throughout the history of the common law whenever courts have been on the verge of embracing an innovative concept or acknowledging that which science has long recognized, received special obeisance in the law's historical refusal to rid our jurisprudence of the illogical, unjust, and inconsistent impact requirement.[28]

In the first half of the twentieth century, however, the majority of American jurisdictions followed their British counterparts and

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[25] *See generally* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896); McNiece, *Psychic Injury and Tort Liability in New York*, 24 ST. JOHN'S L. REV. 1 (1949) [hereinafter cited as McNiece].

[26] W. PROSSER, LAW OF TORTS § 54, at 327 (4th ed. 1971).

[27] *Id.* (footnote omitted).

[28] *See* Robb v. Pennsylvania R.R., 58 Del. 454, 210 A.2d 709 (1965). *See generally* Note, *Negligent Infliction of Mental Distress in Tennessee—A Contrast of Standards*, 2 MEM. ST. L. REV. 389 (1972). As one court stated: "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation." Mitchell v. Rochester Ry., 151 N.Y. 107, 110, 45 N.E. 354, 354-55 (1896).

rejected the impact requirement.[29] They recognized the true problem as an evidentiary one: Can a plaintiff prove by a preponderance of the credible evidence that the psychically induced mental or physical injuries were proximately caused by the defendant's negligently wrongful conduct? The issue was the reliability of the claim, *not* the culpability of the tortfeasor. A lesser problem was presented in the case of intentionally wrongful conduct, where the degree of culpability or the heinousness of the conduct provided a sufficient yardstick to determine the reliability of the alleged psychic injuries.[30] Where the conduct was merely careless, however, an additional measuring tool for determining the genuineness of the plaintiff's claim was deemed necessary, and the courts had imposed the physical impact requirement.[31]

As a result of increased medical and scientific study of psychic trauma, its causes and its effects, such psychically induced mental or physical injuries became more readily provable, and the impact yardstick for measuring the claimant's veracity or the extent of his damages became an anachronism. This was finally recognized by the New York Court of Appeals in 1961 in a case in which the plaintiff had received a psychic trauma while riding in the defendant's ski lift in which a safety bar had been negligently fastened.[32] The court abolished the impact requirement as the essential preliminary test of genuineness of psychic harm and concluded that such injuries could be competently established in some cases absent impact. Rather than arbitrarily bar all such claims, valid and invalid, the court preferred to rely upon competent medical proof and the historic ability of the judge and jury to weed out dishonest claims.[33] Accordingly, neither New York nor California[34] imposes an impact requirement which could bar a bystander's claim for psychic

[29] *See, e.g.*, Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); Falzone v. Busch, 45 N.J. 559, 214 A.2d 12 (1965); Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957). *But see* Knaub v. Gotwalt, 422 Pa. 267, 220 A.2d 646 (1966), *overruled,* Neiderman v. Brodsky, 436 Pa. 401, 261 A.2d 84 (1970). Justice Musmanno's dissenting opinion in *Knaub* has this lyric and imaginative opening: "It is a matter of infinite regret to me that in the train of Progress in the Law of Humanity, Pennsylvania is a car frequently clattering close to the caboose instead of cheerfully gliding over the rails immediately behind the locomotive." *Id.* at 273, 220 A.2d at 648 (Musmanno, J., dissenting).

[30] *See generally* W. PROSSER, LAW OF TORTS § 12 (4th ed. 1971).

[31] *See* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1896).

[32] Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

[33] *Id.* at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38.

[34] *See* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

trauma. The New York courts will, however, preclude recovery if the plaintiff is not within the foreseeable zone of physical danger.[35]

2. *The Zone of Physical Danger Limitation*

Ever since the landmark decision in *Palsgraf v. Long Island Railroad,*[36] the zone of danger test has been utilized to determine whether the plaintiff was sufficiently proximate to the defendant's negligent conduct so that injury to the plaintiff could have been reasonably foreseen by the defendant, thereby imposing upon the defendant a duty to act carefully in regard to the class of persons to which the plaintiff belonged. The zone or orbit of danger test became a facile yet fair guide to the courts in the gray area where factual questions of proximate causality would generally be resolved by a sympathetic jury in favor of the injured party. It is important to note, however, that in *Palsgraf* and its immediate progeny, plaintiffs' injuries were caused by physical impact. The concept of a foreseeable zone of *physical* danger was relevant in defining the duty imposed upon the defendant to act with care insofar as the risk of *physical* harm to the plaintiff was concerned. Foreseeability, always a significant factor in determining the often ephemeral concept of duty, was a traditional tort concept adopted to circumscribe the physical area within which the plaintiff must be located if the injuries caused by the tortfeasor's negligent conduct are to be compensable.[37] The impracticability of utilizing this concept of a physical zone to limit a negligent tortfeasor's liability for injuries resulting from psychic trauma should be readily manifest. The foreseeable zone of *physical* danger is demonstrably different and perceptively smaller than the foreseeable zone of *psychic* danger.[38]

Nevertheless, in many cases where the plaintiff has suffered real and serious mental and physical injuries psychically induced by the contemporaneous sensory perception of injury to another, relief has been denied by a mechanical application of the zone of physical danger test. For example, in *Whetham v. Bismarck Hospital,*[39] the plaintiff mother suffered severe mental and emotional injury when a hospital employee dropped her newborn infant on a tile floor. The

[35] *See* Tobin v. Grossman, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).

[36] 248 N.Y. 339, 162 N.E. 99 (1928).

[37] *See, e.g.,* Owens v. Childrens Memorial Hosp., 480 F.2d 465 (8th Cir. 1973); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950); Guilmette v. Alexander, 128 Vt. 116, 259 A.2d 12 (1969).

[38] *See* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970).

[39] 197 N.W.2d 678 (N.D. 1972).

North Dakota Supreme Court refused to adopt the *Dillon* rationale, and instead quoted extensively from the earlier *Amaya* decision and the *Dillon* dissent. Agreeing with the *Tobin* rationale, the court concluded that the mother could recover only if she herself had been threatened with physical injury, *i.e.*, had been within the orbit of physical danger.[40]

The facts of the *Dillon* case illustrate the inapplicability of such an arbitrary and artificial limitation of liability where psychic trauma is involved. In *Dillon,* the defendant argued that while a sister of the injured child might have been within the zone of physical danger, the mother, located a few feet farther away from the accident, was not. Such a contention suggests that one person who suffers psychic trauma on observing a loved one negligently injured may recover while another, suffering identical injuries, may not, based entirely on the number of feet each is removed from the accident site, even if the presence of each is foreseeable to the tortfeasor. The zone of physical danger test is simply inapplicable in such a situation.[41]

If a negligent act contemporaneously causes direct physical injury to one and psychic trauma with resulting physical injuries to another, a foreseeable zone of danger can be defined within which the psychic trauma should have been reasonably anticipated. Such an orbit of danger should not be limited, however, to that physical area immediately surrounding the defendant. The audiovisual senses, those conduits of trauma most often involved in the receipt of psychic injury, are not dependent upon imminent proximity to the negligent act. Once it is established that psychic trauma is a foreseeable consequence of a particular negligent act, the zone of danger test, if applicable, must be one of psychic rather than physical trauma.[42] Whether the presence of the psychically injured party is foreseeable is another significant question.[43] But if the injured party's presence is foreseeable, or, as in the Stated Hypothetical,

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[40] *Id.* at 684.

[41] According to the court in *Dillon:*

> [T]o rest upon the zone of danger rule when we have rejected the impact rule becomes even less defensible. We have, indeed, held that impact is not necessary for recovery. The zone of danger concept must, then, inevitably collapse because the only reason for the requirement of presence in that zone lies in the fact that one within it will fear the danger of *impact.*

68 Cal. 2d at 733, 441 P.2d at 915, 69 Cal. Rptr. at 75 (1968) (citation omitted) (emphasis in original).

[42] *See* D'Ambra v. United States, 114 R.I. 656, 656-57, 338 A.2d 524, 531 (1975).

[43] *See* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970).

actually known, it would appear that the only reasonable circumscription of the extent of the duty of care owed by the tortfeasor should be that of a reasonably foreseeable zone of danger within which psychic trauma may be inflicted.

3. *The Fear for Self-Limitation*

The plaintiff may also be denied recovery if his psychic injuries were induced *solely* by reason of fear for the safety of another, rather than fear, at least in part, for his own physical well-being.[44] Closely akin to the zone of danger limitation, this rationale for prohibiting recovery has been greatly criticized but stubbornly adhered to throughout the United States. In *Amaya,* the parent had expressly denied any fear for self by testifying that she was worried only about the safety of her child who was crushed beneath the wheels of an ice truck. Relying, *inter alia,* upon this factor, the court denied recovery, thus implicitly penalizing the parent who, disregarding peril to self, fears only for the safety of his child.[45] A rule which relies upon psychological reactions in a time of severe stress, *i.e.,* whether the psychic trauma is caused by fear for one's own safety or solely by fear for the safety of a loved one, is arbitrary at best and devious at worst.

The injustice of this distinction was noted in a 1974 Texas case[46] brought by a mother whose child had fallen out of a moving automobile as the result of an allegedly defective lock on the back door. The mother testified that, sitting in the front seat, her only fear was for the safety of her child:

> Q: Did you ever at any time fear for your own safety?
> A: No.[47]

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[44] *See generally* Note, *Fear for Another: Psychological Theory and the Right to Recovery,* 1969 ARIZ. ST. L.J. 420.

[45] The *Amaya* court noted:

> Plaintiff states in her opening brief that "The Court offered plaintiff's counsel the opportunity to amend and state that the fright and shock suffered by the plaintiff was for the fear of her own safety. Plaintiff's counsel declined [,] stating to the Court that the plaintiff suffered fright and shock as a result of being compelled to watch her infant child crushed beneath the wheels of an ice truck, and that all the fright and shock she suffered was as a result of her fear of the safety of her child, and not out of fear for her own safety." Defendants assert that they "accept this volunteer statement as a stipulation by [plaintiff]," and we treat it therefore as an amendment to the complaint.

59 Cal. 2d at 298-99, 379 P.2d at 514, 29 Cal. Rptr. at 34 (brackets in original).

[46] Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923 (Tex. Ct. Civ. App. 1974).

[47] *Id.* at 925.

Is such a truthful answer to render the parent remediless? Is this not an invitation to perjury? Is liability to be based upon such a feeling generated under emergency circumstances and described under oath months or years later? In the Texas case the court criticized such a result, and allowed recovery.[48]

4. *The Physical Manifestation Limitation*

In light of the great strides medical science has made in the past few decades regarding the diagnosis and provability of mental or emotional injury, it is surprising to find courts still reluctant to allow an injured party to recover for such emotional injury in the absence of physical injury.[49] Nevertheless, such reluctance continues to exist, and it is interesting to note that even in California physical injuries are essential to the plaintiff's recovery.[50] The requirement of physical injury was a limitation engrafted by the courts upon recoverability for mental injury as an assurance of genuineness. Today, however, it is valid to ask whether such a "test" of genuineness is any more necessary than the impact requirement, which was designed to serve the same purpose. There is eminent authority declaring that it is not.[51]

5. *The Potential Increase in Litigated Cases*

Long a bugaboo thwarting any extension of existing legal theory, the potential flood of litigation factor calls to mind Lord Abinger's quaint exhortation in defense of the privity limitation in the products liability area: "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."[52] Such reasoning can hardly serve as a valid criterion for evaluating the common law right of an individual against physical or psychic invasion of his person, and has in fact been condemned by the vast majority of authorities,[53] including the New

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[48] *Id.* at 926-27.

[49] RESTATEMENT (SECOND) OF TORTS § 436A (1965), however, requires resulting physical injury for such a claim to be recoverable. For a case denying recovery, see Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (Ct. App. 1975).

[50] *See* Capelouto v. Kaiser Foundation Hosps., 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972).

[51] *See* notes 109-12 and accompanying text *infra*.

[52] Winterbottom v. Wright, 10 M. & W. 109, 114, 152 Eng. Rep. 402, 405 (Ex. 1842).

[53] According to Dean Prosser, "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of

York Court of Appeals: "This court has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts."[54]

6. *The Potential Increase in Fraudulent Claims*

Another point of agreement between the California and New York courts is that the specter of an avalanche of fraudulent claims should not deter recognition of legitimate claims. According to then Judge, now Chief Judge Breitel of the New York Court of Appeals: "Similarly, [this court] has rejected the argument that recognizing a right of recovery may increase the number of fraudulent claims, so long as the damages are not too conjectural."[55] A contrary position would not only exhibit a cynical lack of faith in the entire judicial system, but would also penalize the honest because of the potential activities of the dishonest. The overwhelming trend today is to reject potential fraud as a ground for denying relief.[56]

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incompetence on the part of any court of justice to deny relief upon the ground that it will give the court too much work to do." Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877 (1939) (footnote omitted). For interesting analyses of the potential "avalanche of litigation," compare Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958), wherein the impact rule was retained for fear of opening a Pandora's box and releasing a flood of litigation, with the conclusions of Dean McNiece, whose study has indicated that no deluge of cases resulted in those jurisdictions which had abolished the impact rule. McNiece, *supra* note 25, at 32.

[54] Tobin v. Grossman, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 422, 301 N.Y.S.2d 554, 558 (1969). The key word is "cognizable," for while the *Tobin* court denied that a "proliferation of claims" constituted a valid reason to deny relief, relief was nevertheless denied due to fear of potentially unlimited liability extending "to older children, fathers, grandparents, relatives, or others *in loco parentis*, and even to sensitive caretakers, or even any other affected bystanders." *Id.* at 616, 249 N.E.2d at 423, 301 N.Y.S.2d at 559. And if the wrong is not "cognizable?" "While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world." *Id.* at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

[55] *Id.* at 615, 249 N.E.2d at 422, 301 N.Y.S.2d at 558 (citation omitted). *Accord*, Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

[56] *See generally* Green v. Shoemaker, 111 Md. 69, 73 A. 688 (1909); Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 A. 540 (1930); Samms v. Eccles, 11 Utah 2d 289, 358 P.2d 344 (1961); Lambert, *Tort Liability for Psychic Injuries*, 41 B.U.L. REV. 584 (1961). One medicolegal expert takes the view that with the development of medical knowledge and methods of ascertaining psychic injury, the malingerer is doomed to defeat. Cantor, *Psychosomatic Injury, Traumatic Psychoneurosis, and Law*, 6 CLEV.-MAR. L. REV. 428, 435-37 (1957) [hereinafter cited as Cantor]. Such a position should be all the more sound 20 years later.

7. *Potential Unlimited Liability and Unduly Burdensome Liability*

One of the strongest arguments against allowing bystander recovery is that based on unlimited or unduly burdensome liability, a public policy issue that is unrelated to the traditional tort concepts of negligence, *viz.*, duty, breach, proximate causality, and damages.[57] This was the plaintiff's major stumbling block in *Tobin*,[58] and it poses a problem of profound significance with overriding social and legal implications: To what extent should the pragmatic considerations of a defendant's financial ability to cope with a situation of great or even catastrophic proportions influence a court's determination of liability which would otherwise be based upon common law principles? While the question seems to lend itself to a summary resolution in favor of the injured party, especially when a catastrophe is not involved, such is not the usual judicial response. On the contrary, the prospect of unduly burdensome liability has been a significant factor in decisions limiting liability to those in the foreseeable orbit of physical danger.[59] In a significant 1935 decision, the Wisconsin Supreme Court dismissed the claim of a mother who had suffered a violent emotional shock when she witnessed, from inside her house, the defendant's negligent killing of her child in the street.[60] The court based its ruling on several theories: First, a finding of liability would be wholly out of proportion to defendant's culpability; second, it would place an unreasonable burden on the users of the highway; third, it would open up a field of recovery that has no sensible or just stopping point; and fourth, the effects might be so extreme as to shock the conscience of society.[61] The court embraced the *Palsgraf* zone of physical harm theory, eschewed a proximate causality test, and spoke in terms of the duty owed by the defendant: "Such consequences are so unusual and extraordinary, viewed after the event, that a user of the highway may be said not to subject others to an unreasonable risk of them by the careless management of his vehicle."[62]

In a more recent Wisconsin decision, *Colla v. Mandella*,[63] which

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[57] *See* Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

[58] 24 N.Y.2d at 617, 249 N.E.2d at 423, 301 N.Y.S.2d at 560.

[59] *See* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[60] Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935).

[61] *Id.* at 613, 258 N.W. at 501.

[62] *Id.*

[63] 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

did not involve a bystander, the court discussed the arguments of unduly burdensome and unlimited liability, and concluded that they should more accurately be stated in terms of public policy since any such denial of liability would be based on an alleged policy against the imposition of burdensome or unlimited liability, rather than on any theory of duty or causation. The *Colla* court, however, denied the defendant's motion for summary judgment on a claim arising out of a heart attack induced by fright when the defendant's truck crashed into the plaintiff's house. The injuries were foreseeable, the homeowner was within the zone of physical harm, and he was "directly" affected by the defendant's negligence.[64] No unduly burdensome or unlimited liability would ensue.

This same concept of *direct* rather than *indirect* injury was highlighted in *Tobin,* where the court stated that "indirect" harm realized from the loss or injury of a loved one is a noncompensable risk of living and loving.[65] According to *Tobin,* if courts are to allow recovery to indirectly affected bystanders who observe tortious conduct from a position of physical safety, "there appears to be no rational way to limit the scope of liability."[66]

Is there a rational way to limit liability? What of the traditional tort concepts of duty, breach, and proximate causality? Haven't these time-honored principles stood the public in good stead when a similar issue was raised in other contexts? It would appear so.[67]

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[64] *Id.* at 599-600, 85 N.W.2d at 348.

[65] 24 N.Y.2d at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561-62. *See also* Owens v. Childrens Memorial Hosp., 480 F.2d 465 (8th Cir. 1973). That a determination of whether injury suffered by a claimant is direct or indirect is problematic was demonstrated in Howard v. Lecher, 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (2d Dep't 1976). The *Howard* majority denied recovery for emotional harm suffered by parents who alleged that the defendant doctor negligently failed to advise them of tests available to determine whether they were carriers or their unborn child was afflicted with fatal Tay-Sachs disease. The majority found that the only direct injury was that suffered by the child, and any injury to the parents was merely indirect. The dissent, however, determined that at least the plaintiff wife's injury was "directly caused by the obstetrician's breach of duty . . . ." *Id.* at 436, 386 N.Y.S.2d at 470 (dissenting opinion).

[66] 24 N.Y.2d at 618, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

[67] This sentiment was forcefully expressed in the *Tobin* dissent by the late Judge Kenneth B. Keating, former United States Senator and more recently Ambassador to India and Israel. Judge Keating stated:

> The rationalization for the result reached here is the supposed terror of "unlimited liability." . . . There have already been decisions imposing liability of far greater dimension than can ever arise if we should embark upon a search for "essential justice" in the bystander class of cases.
>
> . . . Any limitations [on bystander recovery], if needed, should be developed on a case by case basis, using proximate cause and foreseeability as a means to avoid anomalous results. The only real requirement, however, which policy and

8. *The Necessity of a "Traumatic" Shock*

It is generally conceded by legal scholars that even under the most liberal theory of bystander recovery, the psychic impact upon the injured party must be "traumatic." That is, the principal cause of the psychological disability must be a single, sudden, or unexpected event; a shock to the bystander's mental and psychological equilibrium; or a trauma or "blow" to his nervous system.[68]

Medical opinion, on the other hand, differs with this view, and support can be found for the theory that chronic stress may be even more likely to cause serious emotional and physical problems than is traumatic shock.[69] For example, in *Carter v. General Motors Corp.*,[70] workmen's compensation was awarded to a plaintiff who had suffered psychosis as a result of the emotional pressure involved in keeping up with his assembly line schedule. While a workmen's compensation scheme may be more flexible than the common law in such a situation,[71] the dissent in *Carter* nevertheless argued that recovery should be denied because the plaintiff's injury had not been caused by a single physical injury or a single mental shock.[72]

A classic instance of judicial reluctance to extend the common law so far is found in *Owens v. Childrens Memorial Hospital*,[73] wherein the plaintiffs had allegedly suffered severe psychic and physical injuries from observing their infant son deteriorate over a one-month period and die as a result of the defendants' alleged negligence and malpractice in failing to properly diagnose and treat the infant. The plaintiffs' claims failed three tests: the impact test, the zone of danger test, and the trauma test. Without discussing the merits of each test, the federal court applied Nebraska law and ruled against the plaintiffs, indicating a severe reluctance to hold otherwise in the absence of a recent state decision on point. Accordingly, the court simply stated as grounds for denying relief that "the incident was slowly unfolding rather than traumatic."[74]

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justice dictate, is stringent evidence of causation and of actual injury to deter those who would use a sound and just rule as a cover for spurious claims.

Id. at 620-21, 249 N.E.2d at 425, 301 N.Y.S.2d at 562-63 (Keating, J., dissenting). *See* text accompanying notes 133-36 *infra.*

[68] Selzer, *Psychic Disabilities Following Trauma*, 1970 LEGAL MED. ANN. 389, 398-401.

[69] *Id.* at 399. *See also* Selzer, *Psychological Stress and Legal Concepts of Disease Causation*, 56 CORNELL L. REV. 951, 952-54 (1971).

[70] 361 Mich. 577, 106 N.W.2d 105 (1960).

[71] *See* Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 508, 330 N.E.2d 603, 605, 369 N.Y.S.2d 637, 640 (1975), *discussed in* text accompanying notes 156-63 *infra.*

[72] 361 Mich. at 594-609, 106 N.W.2d at 114-21 (Kelly, J., dissenting).

[73] 480 F.2d 465 (8th Cir. 1973).

[74] *Id.* at 467.

The *Owens* court was able to reach this conclusion despite a 1937 Nebraska high court decision[75] which had granted recovery to the representatives of a dairy farmer who had become depressed, suffered a decompensated heart, and ultimately died as a result of his cows being poisoned by bran negligently sold by the defendant. The farmer's estate was able to recover for the physical consequences of his emotional disturbance, supposedly because he had been "directly imperiled" by the defendant's negligent act.[76]

In sum, the necessity of a "traumatic" shock as the cause of psychic harm and resulting physical injuries is generally accepted in the law of torts, and is not an appropriate subject for a challenge herein. That must come at another time.[77]

THE ENGLISH EXPERIENCE

The decisional law from the English courts is highly instructive, if not completely persuasive.[78] English authorities side with *Dillon* rather than *Tobin,* and allow recovery to a parent outside the zone of physical harm who suffers psychic trauma as a result of observing the negligent infliction of physical injury upon his child.[79] A glance at several cases demonstrates the evolution of this theory and the caution which is required when such an innovative concept is being formulated.

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[75] Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674 (1937), *aff'd,* 135 Neb. 232, 280 N.W. 890 (1938).

[76] It would appear that those directly imperiled were primarily the cows, and secondarily the customers who consumed poisoned milk. The farmer, who was concerned over his cows, his customers, and his lost business, manifestly stands somewhere down the line from these "directly" injured parties. It is noteworthy that this 1937 decision has not been followed by the Nebraska courts and has been described as an anomaly in Nebraska law. Owens v. Childrens Memorial Hosp., 347 F. Supp. 663, 669 (D. Neb. 1972), *aff'd,* 480 F.2d 465 (8th Cir. 1973).

[77] The major stumbling block in allowing for recovery of psychic illness resulting from chronic stimuli rather than from a traumatic event is the inherent speculative nature of the problem. If the defendant's negligent act causes a trauma leading to psychic sequelae, a direct causal relationship can be established. This is not generally so if the plaintiff's injury results from many different stimuli over a period of time. While an argument may be made that if the injury is at all traceable to the defendant's negligence a factual question is at least presented regarding potential liability, the speculative nature of such a position is clear. For purposes of this Article, the requirement that the psychic injury be induced by a traumatic shock has been accepted.

[78] The leading English cases discussed herein were discussed in both *Dillon,* 68 Cal. 2d at 744-46, 441 P.2d at 922-24, 69 Cal. Rptr. at 82-84, and *Tobin,* 24 N.Y.2d at 611-12, 249 N.E.2d at 420, 301 N.Y.S.2d at 555, and are studied by first year law students as classic instances of the development of tort theory. *See* C. GREGORY & H. KALVEN, CASES & MATERIALS ON TORTS 986-1012 (2d ed. 1969).

[79] *See, e.g.,* Boardman v. Sanderson, [1964] 1 W.L.R. 1317 (C.A. 1961), *discussed in* text accompanying notes 87-94 *infra.*

The impact prerequisite was alive and well in England in 1888, and thus recovery for physical injuries resulting from a psychic trauma was denied to a plaintiff whose horse-drawn buggy was *almost* struck by a passing train.[80] The court therein referred to the possibility of imaginary claims and concluded that the plaintiff's damages were "too remote." The authority of this case, however, was severely diluted a few years later when a claimant was allowed to recover for fright and miscarriage despite the absence of any actual impact by the defendant's horse-drawn van.[81]

In 1925, recovery was allowed to a bystander in *Hambrook v. Stokes Bros.*,[82] the first English decision that clearly falls within *Dillon's* direct ancestral lineage. The *Hambrook* court rejected the theory that, for recovery to be allowed, the mother's fear must be solely for her own safety rather than for the safety of her child, and concluded that the two emotions were not so clearly divisible.[83] The House of Lords subsequently applied the brakes to this runaway lorry filled with potentially limitless psychic trauma claims in a case in which the pregnant plaintiff had been frightened by observing from a distance an accident involving strangers.[84] The plaintiff's shock resulted in her bearing a stillborn child one month later. Recovery was denied, principally on the ground that the negligent driver owed no duty to the world at large, but only to those whose injuries, psychic or physical, could have been reasonably foreseen.[85]

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[80] Victorian Rys. Comm'rs v. Coultas, [1888] 13 App. Cas. 222 (P.C.).

[81] Dulieu v. White & Sons, [1901] 2 K.B. 669. For a discussion of *Coultas* and *Dulieu* and the eradication of the impact doctrine in England, see McNiece, *supra* note 25, at 3-8.

[82] [1925] 1 K.B. 141 (C.A. 1924).

[83] *Id.*; *accord*, Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923 (Tex. Ct. Civ. App. 1974).

[84] Bourhill v. Young, [1943] A.C. 92 (H.L. 1942).

[85] The House of Lords declared:

> The duty is not to the world at large. It must be tested by asking with reference to each several complainant: Was a duty owed to him or her? If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or their relations or friends normally I think no duty would be owed, and if, in addition, no shock was reasonably to be anticipated to them as a result of the defender's negligence, the defender might, indeed, be guilty of actionable negligence to others but not of negligence towards them. In the present case the appellant was never herself in any bodily danger nor reasonably in fear of danger either for herself or others. She was merely a person who, as a result of the action, was emotionally disturbed and rendered physically ill by that emotional disturbance. The question whether emotional disturbance or shock, which a defender ought reasonably to have anticipated as likely to follow from his reckless driving, can ever form the basis of a claim is not in issue. It is not every emotional disturbance or every shock which should have been foreseen.

Id. at 117.

In the opinion of the court, the concept of duty was intimately intertwined with strong public policy considerations:

> The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.[86]

The court concluded that a user of the highway does not breach a duty to every passerby when he negligently operates his motor vehicle, and thus ruled in the defendant's favor since remoteness of damages precluded liability.

The proposition for which *Hambrook* is often cited, recovery by a bystander for emotional shock resulting from observing injury to another, was finally adopted in *Boardman v. Sanderson.*[87] There, the plaintiffs, an eight-year-old boy and his father, went to a service garage to pick up an automobile. The father was instructed by the defendant to go into the office to pay the bill. While he was doing so, the defendant backed the automobile out of the narrow garage and over the infant plaintiff's foot. On hearing his son's scream, the father rushed outside and saw the infant with his foot trapped under the wheel of the car. The young boy, of course, recovered for (and from) his physical injuries, and the significant question was whether the father, who was clearly outside the zone of physical harm, could recover for the shock and fright he experienced. The court based its decision allowing recovery upon the breach of duty owed by the defendant to the father:

> The defendant knew that the infant was in the yard and that any carelessness in driving on his part might result in injury to the infant as, in fact, it did. He knew that the father was within earshot and he knew also that the father was in such a position that if he heard a scream from the infant he was bound to run out, human nature being what it is, to see what was happening to the infant; and that is, in fact, what happened.[88]

Similar to the Parent in the Stated Hypothetical, the adult plaintiff in the *Boardman* case was, to the *knowledge* of the defendant, on the premises and within earshot of the infant son. Accordingly, it was reasonably foreseeable that injury to the son would be

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[86] *Id.*

[87] [1964] 1 W.L.R. 1317 (C.A. 1961).

[88] *Id.* at 1321.

observed by the father, rendering him susceptible to fright, shock, and resulting injury.

To reach its decision in *Boardman,* the court was compelled to distinguish a 1953 case[89] in which recovery had been denied to a parent who had mistakenly believed that her child had been run over by the defendant's taxicab. In fact, the child had not been seriously injured, but what the mother observed—her child's scream and the child's tricycle lying beneath the cab—caused severe emotional shock. The denial of recovery was based principally upon the theory that the defendant had breached no duty to the parent since it was unforeseeable that the mother would have observed the accident from a position of safety 80 yards away. One member of the court believed that the defendant had breached no duty to the mother because the taxicab was being operated slowly, a maneuver which should not have reasonably terrified a mother in a distant position of safety.[90] There are inherent difficulties in both positions. On the one hand, why is it not reasonably foreseeable in a residential community that the parent of a small boy riding his tricycle would be nearby? On the other hand, why is it significant that the defendant backed his cab quickly or slowly? Indeed the latter maneuver might cause more severe anguish to the onlooker. In point of fact, the serious problem thwarting plaintiff's recovery was that she had been mistaken; her child had not been seriously hurt. No court has held a tortfeasor responsible for psychic injuries suffered as a result of the mistaken belief that a child has been severely injured. It is enough to say that a tortfeasor should be responsible for psychic injury suffered by a parent who in fact observes serious physical injury to his child. The common sense rules of existence in society would have to be rewritten before liability could be imposed upon a tortfeasor for psychic injury suffered as a result of imagined physical injuries inflicted upon another.[91]

While the English experience demonstrates the difficulties to be encountered in formulating a rule of recovery for psychic injury

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[89] King v. Phillips, [1953] 1 Q.B. 429 (C.A.).

[90] *See id.* at 433 (Singleton, L.J.).

[91] As Chief Judge Cardozo stated: "Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform." Palsgraf v. Long Island R.R., 248 N.Y. 339, 343, 162 N.E. 99, 100 (1928). The eminent jurist was, of course, referring to the foreseeability of phyyical injuries being inflicted upon someone outside the "orbit of danger." How appropriate his remarks are when the injuries complained of are not physical, but psychic, when the injured party is outside the orbit of physical danger, and when the presumed cause of the psychic distress is severe physical injury to a loved one who, in fact, is unharmed! Prevision, indeed!

to bystanders, such specters should deter neither lawyers nor judges from venturing into this troublesome area.[92] If a line of circumscription is to be drawn for the sake of public policy, or even in the application of traditional tort principles, is it not more reasonable and humane to draw it somewhere other than at the point where no recovery is allowed simply because drawing the line elsewhere is difficult? Is not the line drawn in *Boardman* and *Dillon* more reasonably arbitrary than that drawn in *Tobin?*

In Great Britain, the plaintiff in a case of traumatic shock need not be within the zone of physical injury, but only within the zone of emotional shock, as is the Parent in the Stated Hypothetical. It is not a great extension of Judge Cardozo's orbit of physical danger limitation to apply such a theory to a situation in which injuries are psychically induced.[93] As the *Boardman* court concluded, it was

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[92] It is not intended to underestimate the difficulties in articulating and applying a rule of liability in this area, where the factual possibilities are limited only by the extent of one's imagination. Two recent English cases are noteworthy in this regard. In Schneider v. Eisovitch, [1960] 2 Q.B. 430 (1959), a married couple were passengers in the car of the defendant whose negligence caused the husband to be killed and the wife to be rendered unconscious. When she returned to consciousness in the hospital, she was advised of her husband's death and suffered further severe shock and anguish. Recovery was allowed for all her injuries, based upon the fact that she had been physically injured in the accident and that the defendant's breach of duty to her did not terminate upon her being transported from the scene thereof. This was not a case concerning recovery by a bystander, of course, but rather one with a serious proximate causality issue. For a discussion of proximate cause, see, *e.g.*, Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955).

Another interesting situation arose in Chadwick v. British Rys. Bd., [1967] 1 W.L.R. 912 (Q.B.). A train wreck in which 90 persons were killed occurred about 200 yards from the plaintiff's house. For six hours the plaintiff participated in rescue operations, crawling in and out of the trains and administering to the injured. The scene was apparently one of "sheer horror" and affected the plaintiff greatly, resulting in extended hospitalization due to severe emotional shock. The court based its decision allowing recovery upon the dual theories that danger invites rescue and that the plaintiff became physically involved in the prolonged accident situation. *Id.* On the liability of a tortfeasor to a rescuer, see Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

Finally, attention must be called to Storm v. Geeves, [1965] Tasm. L.R. 252, in which the Supreme Court of Tasmania allowed recovery to a parent who was notified by one of her children that another child had been killed while alighting from his school bus. The court discussed the difficulty in simply applying pure tort theory, noting that once duty, breach, and proximate cause are established, a tortfeasor's potential liability is not limited. The court apparently viewed the problem as simply a question of negligence and concluded that the "criterion of liability for injury by shock caused by a wrongful act is the same as the criterion of liability for any other injury so caused . . . ." *Id.* at 265. For an interesting discussion of these cases, see Kalven, *Tort Law—Tort Watch*, 34 J. AM. TRIAL LAW. ASS'N, 1, 12-29 (1972).

[93] For a most articulate and persuasive discussion of the orbit of psychic danger, see the concurring opinion of Justice Kelleher in D'Ambra v. United States, 114 R.I. 643, 658-64, 338 A.2d 524, 531-34 (1975) (Kelleher, J., concurring). Justice Kelleher declared: "A witness such as plaintiff here [who observed the death of her child] is as much within the 'zone of danger' of psychic trauma as is a witness standing in the right-of-way within the zone of physical danger." *Id.* at 662, 338 A.2d at 533.

clearly foreseeable that the father would observe the injuries to his son and suffer emotional shock. So, too, was it foreseeable in *Dillon*. And so, too, is it foreseeable in the Stated Hypothetical, even though the plaintiff in each of these situations is outside the zone of *physical* harm. The zone of mental or emotional harm is not so readily circumscribed as that of physical harm, but if the risk of psychic injury can be reasonably perceived, should not that risk define the duty of care owed by the actor toward the potential victim? If so, and the duty is breached, any psychic injuries which proximately result are real, the consequences thereof are provable, and the damages therefor should be recoverable.[94]

Establishing Psychic Injury

As discussed above,[95] that aspect of medical science relating to psychic injury has developed greatly since the middle of the fourteenth century when recovery was first allowed for other than physical harm.[96] Medical and psychological experts generally agree that a psychic trauma, an emotional shock which makes a lasting impression on the mind, will normally result when someone is involved in or observes an accident resulting in bodily injury to self or another.[97] The extent of the psychic consequences will depend, for the most part, upon the severity of the trauma and the psychological makeup of the recipient.[98] Should such psychic injury be compensable? Clearly, the problems raised by this question are manifold. The possibility of fraud still exists, although it has been greatly diminished by the developments in medical science generally and in psychiatry specifically. It is generally conceded that psychoneurosis with a psychosomatic injury can be established or disproved by competent medical evidence.[99] A further problem is based on fears that if mere negligence results in liability for minor psychological harms such as grief, dismay, hurt feelings, sorrow and anger, an unrealistic duty of care might be imposed on all potential tortfeasors. A requirement that the psychic injury be serious or severe

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[94] *See generally* Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 Geo. L.J. 1237 (1971).

[95] *See* text accompanying note 49 *supra*.

[96] *See* I. de S. et ux. v. W. de S., Y.B. 22 Edw. 3, f. 99, pl. 60 (1349).

[97] *See* Cantor, *supra* note 56, at 430-37.

[98] *Id.* For an excellent description of the long lasting effects of psychic trauma, known as traumatic neuroses, see Leong v. Takasaki, 55 Haw. 398, 411-13, 520 P.2d 758, 766-67 (1974).

[99] As one authority has declared: "Very rarely, today, can a malingerer recover damages." Cantor, *supra* note 56, at 435.

might allay fears of compensating emotional upsetments which could just as easily have been caused by nontortious conduct.[100] Two fundamental obstacles to recovery, however, continually resurface: First, the requirement of concomitant physical injury as a test of genuineness of the psychic harm; and second, the requisite mental state of the victim prior to the psychic trauma.

The Necessity of Concomitant Physical Injury

The courts formulated the actual physical injury test at an early date as a device to eliminate trivial claims and to corroborate bona fide claims of psychic injury.[101] Despite the fact that there is no theoretical or practical medical reason for retaining such a deterrent to recovery, courts are reluctant to eschew it in favor of an actual injury test that would evaluate the plaintiff's physical and psychic injuries separately, with neither viewed as dependent upon the other. The *Restatement (Second) of Torts* adopts the view that emotional damages alone will not support a negligence cause of action.[102] Following this authority, a California court recently held that allegations of great mental distress and psychoneurotic injury were insufficient to state a claim since they failed to allege any "physical injury," which the court declared must be established to recover for damages sustained by parents who are mere bystanders to their child's injuries.[103] Such a determination is clearly within the

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[100] The Supreme Court of Rhode Island has stated: "Certainly the law should not compensate for every minor psychic shock incurred in the course of daily living; it should not reinforce the neurotic patterns of our society. At some point, however, a person threatened by *severe* mental injury should be able to enforce his claim to reasonable psychological tranquility." D'Ambra v. United States, 114 R.I. 643, 653, 338 A.2d 524, 529 (1975)(footnote omitted) (emphasis added). *See* Note, *Torts—Expanding the Concept of Recovery for Mental and Emotional Injury,* 76 W. VA. L. REV. 176, 186 (1974), wherein the problem is described as one of "separating serious mental disorders from trifling, isolated emotional upsets."

[101] *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.4, at 1031-32 (1956); W. PROSSER, LAW OF TORTS § 54, at 328-30 (4th ed. 1971). For criticism of this requirement, see Brody, *Negligently Inflicted Psychic Injuries: A Return to Reason,* 7 VILL. L. REV. 232, 233-38 (1961); Cantor, *supra* note 56, at 435. Dean Prosser takes a view somewhat at odds with that expressed by Professor Brody and by Dr. Cantor:

> [T]he temporary emotion of fright, so far from serious that it does no physical harm, is so evanescent a thing, so easily counterfeited, and usually so trivial, that the courts have been quite unwilling to protect the plaintiff against mere negligence, where the elements of extreme outrage and moral blame which have had such weight in the case of intentional tort are lacking.

W. PROSSER, *supra,* § 54, at 329 (4th ed. 1971) (footnote omitted).

[102] RESTATEMENT (SECOND) OF TORTS § 436A (1965).

[103] Hair v. County of Monterey, 45 Cal. App. 3d 538, 119 Cal. Rptr. 639 (Ct. App. 1975). In the *Hair* case, the parents sought to recover for psychic injuries caused by their witnessing the effects upon their child of the defendant's alleged medical malpractice. Plaintiffs' child

letter, if not the spirit of *Dillon,* and demonstrates the depth of the disparity which exists today between medical science and jurisprudence.[104]

A similar rationale was expressed in a 1974 Virginia decision[105] in which the plaintiff sought recovery for emotional distress allegedly caused by the defendant's willful misconduct. Refusing to dismiss the claim since it alleged intentional misconduct, the court nonetheless stated that mere negligent, as opposed to intentional, conduct does not provide a valid predicate for recovery of damages for emotional disturbance alone. The court continued:

> However, where emotional disturbance is accompanied by physical injury there may be a recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party

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had undergone oral surgery, and as a result thereof sustained permanent injuries, including blindness, brain injury, quadraplegia, and petit and grand mal. The plaintiffs' claim suffered from several deficiencies, including the facts that the child's injuries had been antecedent to rather than contemporaneous with their own, and that the psychic injury to the plaintiffs was caused by a trauma more chronic than acute. In denying recovery, the court highlighted a phrase from *Dillon* often overlooked by courts following that decision: "[W]e deal here with a case in which plaintiff suffered a shock which resulted in *physical injury* and we confine our ruling to that case." *Id.* at 542, 119 Cal. Rptr. at 641, *quoting* Dillon v. Legg, 68 Cal. 2d 728, 740, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (emphasis added by *Hair* court). Accordingly, the court dismissed the plaintiffs' claim due to their failure to plead physical injury. *See* Capelouto v. Kaiser Foundation Hosps., 7 Cal. 3d 889, 892 n.1, 500 P.2d 880, 882 n.1, 103 Cal. Rptr. 856, 858 n.1 (1972), wherein Justice Tobriner stated that *"Dillon* makes clear that a parent may recover for witnessing a child's distress only if the parent suffers actual physical injury."

[104] The depth of the distrust and lack of mutual respect between doctors and lawyers is not limited to the controversial medical malpractice issue, as witnessed by the following excerpt from an article generally critical of a psychiatrist's ability to diagnose psychic injury with any degree of certitude:

> Regardless of the different theories and systems used in the training of psychiatrists, it can be proved that such training, regardless of the psychiatric system taught, is speculative and subjective in content as practiced today, and is not founded upon scientific principles. Psychiatry has been developed and is taught from combinations of argumentative and speculative theories born from personal experiences and ideas which are presented as facts without classification or validation. There are just too many contradictions and disagreements presently existing which seem to be irreconcilable among the leading psychiatrists and systems to justify the acceptance of psychiatry as an established science.
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> Therefore, since the state of psychiatric diagnosis is presently so fraught with inconsistencies, errors, chance, personality, and intellectual interferences, it has to be concluded that psychiatrists and their psychiatric testimony, when properly weighed and tested, are many times so confusing and contradictory as to be of no constructive help in aiding a court or jury to reach a right and just decision pertaining to an individual's mental or emotional state.

McNeal, *The Value of a Psychiatrist*, 1972 LEGAL MED. ANN. 303, 307, 313.

[105] Womack v. Eldridge, 215 Va. 338, 210 S.E.2d 145 (1974).

> proves by clear and convincing evidence a causal connection between the negligent act, the emotional disturbance and the physical injury.[106]

The court's decision concerning intentionally tortious conduct is illustrative, in that the courts have not been at all reluctant to allow recovery for *mere* emotional harm without accompanying physical injury if the tortfeasor's conduct has been intentional, outrageous, gross, or wanton.[107] The apparent distinction between intentional and negligent conduct goes solely to determining the genuineness of the psychic injury claim. It is submitted that in light of medical and psychiatric achievements, it is not only illogical, it is unjust to deny recovery to those who have suffered actual psychic harm without physical injury solely because the tortfeasor's conduct was negligent rather than intentional.[108]

It appears that the New York Court of Appeals reached this conclusion, at least implicitly, in its famous "impact" case.[109] There, the court allowed recovery for psychic injury by a child who had been trapped in a ski lift in which the safety bar had been negligently fastened. The court failed to highlight to any degree the requirement of accompanying physical injury. A single reference to "residual physical manifestations" was the court's only allusion to somatic injury,[110] and that requirement has been consciously ignored by subsequent lower court decisions in New York.[111] Such a result is not undesirable.

In summary, while many courts still require the existence of

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[106] *Id.* at 340, 210 S.E.2d at 147. The court further stated that "[r]ecovery is permitted for mental distress and physical injuries unaccompanied by actual physical contact where the injuries were caused by a willful, intentional tort." *Id., citing* Moore v. Jefferson Hosp., Inc., 208 Va. 438, 441, 158 S.E.2d 124, 127 (1967).

[107] *See, e.g.,* Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920); Halio v. Lurie, 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961). Dean Prosser in 1956 suggested the following formula to the American Law Institute for inclusion in the revision of the *Restatement of Torts* then being prepared: "One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from it." Prosser, *Insult and Outrage,* 44 CALIF. L. REV. 40, 43 (1956) (footnote omitted). *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965), which incorporates Dean Prosser's formulation. In addition, see the interesting analysis of this issue by Dean McNiece, in which the author tentatively concludes that the so-called new cause of action for intentional infliction of mental disturbance may be "more an invention of the writers [*e.g.,* Prosser] than of the courts." McNiece, *supra* note 25, at 10-11 n.29.

[108] *See* Rodrigues v. State, 52 Haw. 156, 169-74, 472 P.2d 509, 518-21 (1970).

[109] Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

[110] *Id.* at 239, 176 N.E.2d at 729, 219 N.Y.S.2d at 35.

[111] *See generally* Tymann, *Bystander's Recovery for Psychic Injury in New York,* 32 ALB. L. REV. 489, 491-93 (1968), and cases cited therein.

physical injury as a condition precedent to recovery for psychic injury, it is submitted that such a limitation is unnecessary in light of the advanced state of medical science and technology, and today serves principally to defeat rather than corroborate valid claims.[112]

The Preexisting Mental Condition of the Victim

A relatively unscrutinized but problematic aspect of the psychic injury claim concerns the psychic makeup of the injured party, his mental stability or lack thereof, and his susceptibility to psychoneurosis or psychosomatic injury. Two contrary approaches to this problem are immediately indicated. If the traditional tort damage rule is applied, the tortfeasor must take his victim as he finds him[113] and the psychic makeup of the victim is of no significance. On the other hand, the situation may be viewed in terms of foreseeability, including the foreseeability of the type and extent of

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[112] The discussion is rendered academic if one adopts the not unreasonable attitude that psychic and physical injury are never completely severable and independent, and that one always results in the other to some extent.

> All bodily injuries are a combination of physical and emotional disturbance, and only vary in the relative amount of each factor present. For example, in the case of a broken leg there is obviously a great amount of physical injury as represented by the actual fracturing of the bone, but there is also an emotional factor as may be represented in pain, apprehension of the final result, fear of disfigurement and decrease in financial security. Conversely, an individual may be involved in an automobile accident, resulting in only a minor bruise or cut but in a tremendous amount of emotional shock manifested in fear, persistent inability to sleep, inability to eat, nightmares, hysterical anesthesia and paralysis, etc. No longer can an injury be described as either physical *or* emotional, but rather physical *and* emotional. The former concept has been gradually displaced in medicine for the past two or three decades. Likewise students of law should now begin to think in this more progressive interpretation.

Cantor, *supra* note 56, at 431 (emphasis in original). *See also* Modlin, *Psychiatric Reactions to Accidents*, 6 WASHBURN L.J. 317 (1967).

An issue analogous to the prevalent judicial requirement of physical injury where the psychic injury has been negligently caused was raised in Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97 (1974), *discussed in* Kreindler, *Hijacking and Emotional Trauma*, 171 N.Y.L.J. 120, June 21, 1974, at 1, col. 1. The *Rosman* court construed the term "bodily injury" as used in the Warsaw Convention to include psychic injury only if it was induced by, or resulted in, physical injury. 34 N.Y.2d at 399-400, 314 N.E.2d at 856-57, 358 N.Y.S.2d at 109-10. For a discussion of the *Rosman* case, see Note, *International Air Carriers—Psychic Injury and the Warsaw Convention*, 27 MERCER L. REV. 589 (1976).

[113] According to Chief Judge Cardozo in *Palsgraf*, "[we] may assume . . . that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary." Palsgraf v. Long Island R.R., 248 N.Y. 339, 346, 162 N.E. 99, 101 (1928), *citing In re* Polemis & Furness, Withy & Co., [1921] 3 K.B. 560 (other citations omitted). *Accord*, Harris v. Norfolk S. Ry., 319 F.2d 493, 496 (4th Cir. 1963); Dulieu v. White & Sons, [1901] 2 K.B. 669, 679.

the damages suffered. Under this theory the emotional response or psychic impact must be reasonably foreseeable by the tortfeasor for liability to result.[114] Surprisingly, the psychic injury in most negligence cases is accompanied by physical injury, and the preexisting mental condition of the injured party is treated sub silentio as immaterial.[115] This issue takes on much greater significance, however, if recovery is allowed in the absence of physical harm.[116] Under such circumstances, the injury is in no way dependent upon another harm, but is independent, naked of any cloak of respectable tort theory which would otherwise provide a valid predicate for recovery.[117]

Generally, the medical and legal views differ. While psychiatrists recognize that all individuals have some preexisting mental condition which renders them more or less susceptible to psychoneurosis, leading to at least a tentative conclusion that the victim should be accepted as found, the few cases which have confronted the issue are inapposite.[118]

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[114] *See, e.g.*, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Bourhill v. Young, [1943] A.C. 92. *But cf.* Selzer, *Psychological Stress and Legal Concepts of Disease Causation*, 56 CORNELL L. REV. 951, 961 (1971) (preexisting condition usually held causative and thus precludes recovery in workmen's compensation cases).

[115] In *Dillon*, wherein the court expressly limited its holding to a situation in which the plaintiff had suffered a shock resulting in physical injuries, the court simply concluded that it was not unreasonable or unforeseeable for a mother to suffer severe psychic trauma in such an instance: "Surely the negligent driver who causes the death of a young child may reasonably expect that the mother will not be far distant and will upon witnessing the accident suffer emotional trauma." 68 Cal. 2d at 741, 441 P.2d at 921, 69 Cal. Rptr. at 81.

[116] *See, e.g.*, Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970).

[117] *See* McNiece, *supra* note 25, at 10-11 n.29.

[118] *Compare* Cantor, *supra* note 56, *with* Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970). According to Dr. Cantor, who is both a medical doctor and a lawyer:

> It is not contended that everyone and anyone will develop a psychosomatic injury when subjected to a given emotional trauma. Just as the bones of one person are more resistant to fracture than the bones of another, and one person's resistance to bacterial infection is greater than another's, so every person is individual in his susceptibility to psychic damage. The well-adjusted person is most unlikely to develop a psychosomatic injury when subjected to common emotional circumstances. However, the person already full of frustrations, anxieties and hostilities, and who has a suitable genetic background, is apt to develop a disabling psychosomatic injury if subjected to the same set of circumstances.

Cantor, *supra* note 56, at 432.

Dr. Cantor's conclusion is that the "normal" individual is impossible to define and is consequently unavailable as a standard for recovery. Under the contrary view, the actor is liable only if his negligence creates *"a substantial and unreasonable risk of emotional harm to a normal person in the plaintiff's position."* Note, *Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases*, 35 U. CHI. L. REV. 512, 516 (1968) (footnote omitted) (emphasis in original).

Since the possibility of foreseeing an "inordinate" psychic response to a negligent act is remote, if not nonexistent, several authorities have attempted to articulate a standard of normalcy which the prospective victim must meet if he is to recover. In *Rodrigues v. Hawaii,*[119] a case not involving observation of personal injury, the plaintiffs suffered psychic injury upon perceiving negligently inflicted flood damage to their home. In authorizing recovery for the psychic injury,[120] the court applied the traditional reasonable man test, *not* to the tortfeasor, but to the injured party: "Courts and juries which have applied the standard of conduct of 'the reasonable man of ordinary prudence' are competent to apply a standard of *serious* mental distress based upon the reaction of 'the reasonable man.' "[121] Referring to the reasonable victim, "normally constituted," the court limited the defendant's duty of care to the avoidance of causing psychic trauma which can be reasonably foreseen: "[T]he defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous."[122]

This issue usually does not arise in cases where the tortfeasor has negligently inflicted serious physical harm on a child, thus causing psychic trauma to the parent. But what if the defendant claims that the parent's psychic injury was inordinate or unusual, and not foreseeable, even though some psychic injury could have been anticipated? What if serious bodily injury to the child was reasonably anticipated but did not occur? What if the defendant's negligence did not seriously endanger the child, but the parent reasonably thought it had? These and myriad other questions have no facile answers. Foreseeability of psychic harm to a close relative of the physically injured person is an essential element of this newly developing tort theory, and must suffice until a more specific standard can be adduced.[123] If it is foreseeable that *some* psychic trauma may

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[119] 52 Haw. 156, 472 P.2d 509 (1970).

[120] *Contra,* Kroog v. Ray, 52 App. Div. 2d 840, 841, 382 N.Y.S.2d 823, 824 (2d Dep't 1976) (mem.) ("no recovery for 'emotional distress . . . following awareness of damage to one's property' ").

[121] 52 Haw. at 173, 472 P.2d at 520 (emphasis in original) (citation omitted). Today's professors of torts generally refer to this time-honored tort standard as "the reasonable person standard." For an interesting description of a new fictitious person aptly dubbed the "reasonable observer," see Note, *Negligently Caused Mental Distress: Should Recovery Be Allowed?,* 13 S.D.L. REV. 402, 408-09 (1968).

[122] 52 Haw, at 174, 472 P.2d at 521 (citations omitted).

[123] *See* Dillon v. Legg, 68 Cal. 2d 728, 740-42, 441 P.2d 912, 921-22, 69 Cal. Rptr. 72, 81-82 (1968).

be suffered by an observer to the negligent tort, then, so far as damages are concerned, the injured party should recover for the entirety of his damages, whether the precise type or extent of injury could have been anticipated.[124]

Dillon's EIGHT-YEAR HISTORY—HOW HAS IT BEEN RECEIVED?

The landmark California decision has been the focal point of much controversy since it was handed down in 1968. Expressly approved in some jurisdictions, it has been expressly rejected in others, and in its own jurisdiction has been extended in at least one respect and limited in another.

1. *Jurisdictions Approving* Dillon

In at least five jurisdictions, Connecticut, Hawaii, Michigan, Rhode Island, and Texas,[125] the *Dillon* rationale for allowing recovery to the bystander for psychic injury has been approved. In the Rhode Island case, a four-year-old child was struck and killed by a United States mail truck within view of his mother.[126] The court reviewed the concepts of duty and proximate cause, including the role of foreseeability in determining each, and dismissed the administrative impediments to allowing recovery, such as the fear of a myriad of unfounded or fraudulent claims. Focusing on the principal objection to recovery expressed by the *Tobin* court, *i.e.*, the fear of potentially unlimited liability, the court seemed to adopt the three-pronged test of *Dillon:* physical proximity, actual observance of the accident, and a close personal relationship between the bystander and the victim.[127] Taking a fascinating approach, the court

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[124] Harris v. Norfolk S. Ry., 319 F.2d 493 (4th Cir. 1963); Dulieu v. White & Sons, [1901] 2 K.B. 669.

[125] *See* D'Amicol v. Alvarez Shipping Co., 31 Conn. Supp. 164, 326 A.2d 129 (Super. Ct. 1973); Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974); Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (Ct. App. 1973); D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975); Dave Snelling Lincoln-Mercury v. Simon, 508 S.W.2d 923 (Tex. Ct. Civ. App. 1974).

[126] D'Ambra v. United States, 114 R.I. 643, 338 A.2d 524 (1975). The court was responding to a certified question:

> May a non-negligent plaintiff mother, who is foreseeably in the vicinity of her minor child but not in the child's zone of danger, recover damages for mental and emotional harm, accompanied by physical symptoms, caused by observing the death of her child resulting exclusively from the negligence of defendant in driving the truck which struck the child, although she suffered no physical impact?

Id. at 646, 338 A.2d at 525-26.

[127] *See id.* at 656, 338 A.2d at 531.

found that the existence of the third factor established a crucial but very limited exception to the zone of danger rule:

> [W]here a mother witnesses the death of her child, it is only reasonable that the parameters of liability established by the zone of physical danger be bent to accomodate the overwhelming impact of the mother's and child's mental and emotional relationship. Anything less would be to deny psychological reality.[128]

In a most interesting and persuasive concurring opinion, the ephemeral and somewhat ambiguous "moral, economic and policy considerations" upon which the majority opinion seemed to be based were disallowed.[129] Instead "foreseeability" was found to be the crux,[130] based upon Chief Judge Cardozo's famous standard in *Palsgraf:* "the risk reasonably to be perceived defines the duty to be obeyed."[131] Analogizing to recent developments in the law of landowner's liability that emphasize foreseeability rather than the status of the injured party,[132] the concurring justice would add to the threefold *Dillon* formula a requirement that the plaintiff's presence at the scene of the accident be reasonably foreseeable by the tortfeasor.[133]

A more expansive analysis of this point is found in a 1974 Hawaii Supreme Court decision,[134] where the court adopted the requirement that the plaintiff's presence be reasonably foreseeable, and formulated guidelines for determining the foreseeability of a parent's presence at the scene of an accident:

> (1) the child's age; (2) the type of neighborhood in which the accident occurred; (3) the familiarity of the tortfeasor with the neighborhood; (4) the time of day; and (5) any other factors which would put the tortfeasor on notice of the witness' presence.[135]

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[128] *Id.* at 657, 338 A.2d at 531.

[129] *See id.* at 658-64, 338 A.2d at 531-34 (Kelleher, J., concurring).

[130] *Id.* at 659-60, 338 A.2d at 532-33.

[131] Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). Preferring a more traditional approach than the majority, Justice Kelleher remarked: "I have . . . faith in the usefulness of our tort concepts of 'duty' and 'foreseeability' and in the trier of fact's ability to determine what are reasonable risks and what are valid claims of injury in any particular fact situations." 114 R.I. at 659, 338 A.2d at 533 (Kelleher, J., concurring) (footnote omitted).

[132] *See, e.g.,* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir.), *cert. denied,* 412 U.S. 939 (1973); Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976).

[133] 114 R.I. at 663, 338 A.2d at 534. This same point—the foreseeability of the bystander's presence—was described as a jury question to be resolved by the proof at trial in a New York lower court case in 1964. Haight v. McEwen, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. Oneida County 1964).

[134] Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974).

[135] *Id.* at 409, 520 P.2d at 765.

Two notable concepts were articulated by the Hawaiian court: First, that the *Palsgraf* zone of harm is a viable concept although it should not be limited to *physical* harm, but rather should embrace *psychic* harm as well; and second, that to the *Dillon* limitations should be added the necessity that the plaintiff bystander's presence be reasonably foreseeable by the tortfeasor. Not only is the latter a traditional premise for defining the extent of the duty owed by a tortfeasor, but it would satisfy to a great extent the fear of potentially unlimited liability expressed in *Tobin* and elsewhere. The presence of the Parent in the Stated Hypothetical was not only foreseeable, it was actually known to Driver. The right to recovery, under such a fourfold test, is clear.

In the Hawaiian decision, an unusual situation was presented. The infant plaintiff had allegedly suffered psychic injuries without physical impact or resulting physical consequences when he observed the negligently driven motor vehicle of the defendant strike and kill his stepgrandmother. The Hawaii Supreme Court concluded that the *Dillon* prerequisites for recovery should not be employed to bar recovery, but should at most be indicative of the degree of mental stress suffered. The court also declared: "Just as recovery should not be granted to a plaintiff who was standing within the zone of danger but denied to one standing several feet away, it should not be contingent upon the defendant's actual knowledge of plaintiff's presence."[136]

In an important Michigan case allowing bystander recovery, a casebook situation was presented.[137] A mother, watching for her children to return from school, saw the school bus stop in front of her home with red lights flashing. As her daughter alighted and crossed in front of the bus, the defendant's speeding panel truck overtook

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[136] *Id.* at 410, 520 P.2d at 766. Another interesting aspect of the *Leong* case is the lack of any blood relationship between the two victims; the decedent was the mother of the husband of plaintiff's mother. This presented no impediment to the court:

> Neither should the absence of a blood relationship between victim and plaintiff-witness foreclose recovery. Hawaiian and Asian families of this state have long maintained strong ties among members of the same extended family group. The Hawaiian word *ohana* has been used to express this concept. It is not uncommon in Hawaii to find several parent-children family units, with members of three and even four generations, living under one roof as a single family.

Id. at 410, 520 P.2d at 766. However, a less expansive approach to recovery was taken by the Supreme Court of Hawaii in Kelley v. Kokua Sales and Supply, Ltd., 58 Haw. 204, 532 P.2d 673 (1975). In *Kelley*, recovery was denied for severe emotional harm suffered by a father in California, informed by telephone that his daughter and granddaughter had been killed in an accident in Hawaii. The court held that the negligent tortfeasor could not reasonably foresee consequences to a claimant so far from the scene of the accident.

[137] Toms v. McConnell, 45 Mich. App. 647, 207 N.W.2d 140 (Ct. App. 1973).

the parked bus and struck and killed the child. The psychic trauma to the mother was severe, and the court allowed recovery. The court expressly rejected the traditional zone of danger rule for psychic trauma and simply held that "a parent may maintain a cause of action for mental anguish resulting in a definite and objective physical injury generated by witnessing the negligent infliction of injuries upon its [*sic*] child."[138]

2. *Jurisdictions Rejecting* Dillon

The New York Court of Appeals is not the only court that has expressly rejected the *Dillon* rationale. In *Whetham v. Bismarck Hospital,*[139] the defendant's employee dropped the plaintiff's newborn baby as the infant was being handed to the plaintiff for the first time. The infant was seriously injured, and the plaintiff suffered severe psychic trauma. Recovery was denied by the North Dakota Supreme Court on the ground that the plaintiff was outside the zone of physical harm.[140]

Similarly, the Vermont Supreme Court in *Guilmette v. Alexander*[141] rejected the *Dillon* theory and tersely concluded that "[r]ecovery must be brought within manageable dimensions."[142] The court relied upon a recent decision of the high court of its neighbor state, New Hampshire,[143] which had denied recovery on several of the grounds stated in *Tobin:* lack of foreseeability or proximate causality, absence of fear for self, lack of a duty on the part of the defendant, or a right on the part of the plaintiff.[144]

Montana also falls into the category of a jurisdiction rejecting *Dillon,* at least according to the federal district court located in that state:

> [T]he Supreme Court of California in a four to three decision found liability in a case where a mother suffered emotional trauma as a result of an injury to a daughter. This case standing alone is not sufficient to convince me that the Montana Supreme Court would depart from the law established by the great weight of American authority.[145]

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[138] *Id.* at 657, 207 N.W.2d at 146.
[139] 197 N.W.2d 678 (N.D. 1972).
[140] *Id.* at 684.
[141] 128 Vt. 116, 259 A.2d 12 (1969).
[142] *Id.* at 120, 259 A.2d at 15.
[143] Jelley v. LaFlame, 108 N.H. 471, 238 A.2d 728 (1968) (per curiam).
[144] *Id.* at 472, 238 A.2d at 728.
[145] Welsh v. Davis, 307 F. Supp. 416, 417 (D. Mont. 1969) (footnote omitted). For a

THE CALIFORNIA EXPERIENCE FOLLOWING *Dillon*

The courts in California have not experienced the feared deluge of psychic injury cases since the *Dillon* decision was rendered over eight years ago. On the contrary, published California decisions in this area have been sporadic and have demonstrated the prudence, practicality, and persuasiveness of a common law system of jurisprudence that relies heavily upon the foundation of precedent, yet cherishes the opportunity to mark new trails when justice and fairness.require.

In *Archibald v. Braverman,*[146] the plaintiff's thirteen-year-old son was in the act of purchasing a vial of gunpowder from the defendant when it exploded. There is no indication that the plaintiff either saw or heard the explosion, but only that she was at the scene "within moments" thereof and observed her son's frightful injuries.[147] In allowing recovery, the court stretched *Dillon's* "contemporaneous observance" limitation to its fullest — the plaintiff concededly had not observed the tort, but only the injuries resulting therefrom. But, since she was in close proximity both as to distance and time to the scene of the accident, the *Dillon* requirements were held to have been fulfilled.[148] No case has been discovered which has extended the *Dillon* rule any further.

On the other hand, several cases have attempted to curtail any further extension of *Dillon.* For example, in *Capelouto v. Kaiser Foundation Hospitals,*[149] the California Supreme Court expressly reiterated its requirement that there be resultant physical injury before a claimant can recover for psychic injury. Moreover, in a series of cases recovery has been denied by intermediate California courts because the plaintiff did not contemporaneously observe the accident.[150]

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discussion of several jurisdictions which have rejected the *Dillon* rationale, see Note, *Traumatic Mental Injury and the Bystander,* 24 S.C.L. REV. 439 (1972).

[146] 275 Cal. App. 2d 253, 79 Cal. Rptr. 723 (Ct. App. 1969).

[147] *Id.* at 255, 79 Cal. Rptr. at 724.

[148] *Id.* at 256, 79 Cal. Rptr. at 725.

[149] 7 Cal. 3d 889, 500 P.2d 880, 103 Cal. Rptr. 856 (1972). In a footnote, Justice Tobriner emphasized that the record "does *not* reveal that the parents suffered the actual physical injury necessary for recovery under *Dillon.*" *Id.* at 892 n.1, 500 P.2d at 882 n.1, 103 Cal. Rptr. at 858 n.1 (emphasis in original). In Justus v. Atchison, 126 Cal. Rptr. 150 (Ct. App. 1975), the court denied recovery on the ground that there was no contemporaneous observance of the distressing event, but determined that the *Dillon* physical injury requirement is satisfied by "shock . . . to the nervous system . . . ." *Id.* at 159.

[150] *See, e.g.,* Vanguard Ins. Co. v. Schabatka, 46 Cal. App. 3d 887, 120 Cal. Rptr. 614 (Ct. App. 1975) (arrival of plaintiff husband at scene 10 minutes after accident occurred); Powers v. Sissoev, 39 Cal. App. 3d 865, 114 Cal. Rptr. 868 (Ct. App. 1974) (plaintiff suffered

One further California decision must be noted. In *Jansen v. Children's Hospital Medical Center,*[151] the complaint alleged that the defendant's malpractice in failing to diagnose the ailment of the plaintiff's five-year-old daughter caused the child's death, and that the plaintiff suffered emotional trauma and resulting physical injury from witnessing her daughter's gradual demise. The court dismissed the claim and distinguished the *Archibald* decision, in which recovery had been allowed despite the plaintiff's having witnessed only the *results* of the tortious act. The *Jansen* court inferred, without any apparent basis in fact, that the plaintiff in *Archibald* had heard the explosion, and concluded that the gory results in that case necessarily would lead the subsequent observer to mentally reconstruct the precise event "substantially contemporaneously with that event."[152] The *Jansen* court failed to note, however, the self-limiting nature of the *Archibald* decision; in response to the claim of an undue volume of cases, the *Archibald* court had pointed out that the defendant had been engaged in the unlawful activity of selling gunpowder to a minor, "undoubtedly a rare occurrence."[153]

Thus, although the law in California provides no ready answers to the myriad of questions raised by *Dillon,* it does soothe some anxieties: There has been no plethora of false claims, no flood of litigation, and no unlimited liability. Indeed, the concluding paragraph of *Jansen* maintains a prudent attitude:

> In embarking upon this new area of tort law, *Dillon* itself counsels moderation. To extend the broadening process to the whole field of medical malpractice in diagnosis appears to use an unwarranted and impractical expansion. . . . We heed *Dillon's* counsel of caution.[154]

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shock after seeing daughter 30 to 60 minutes after accident); *cf.* Deboe v. Horn, 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971) (complaint of plaintiff wife dismissed for failure to allege presence at scene of husband's accident).

[151] 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (Ct. App. 1973).

[152] *Id.* at 24-25, 106 Cal. Rptr. at 885.

[153] 275 Cal. App. 2d at 256, 79 Cal. Rptr. at 725 (Ct. App. 1969).

[154] 31 Cal. App. 3d at 25, 106 Cal. Rptr. at 885 (1973). The caution of the *Dillon* court was heeded in a troublesome case involving physical injuries suffered by an 18-year-old girl struck by a motor vehicle near her home. Conte v. City of San Jose, Civ. No. 30433 (Cal. Ct. App., July 24, 1973). Within moments after the accident, her four brothers appeared at the scene and allegedly suffered psychic trauma and resulting injuries. Recovery against the city of San Jose for having negligently constructed a dangerous intersection was denied by the trial court based upon the lack of a sufficiently close relationship between siblings. This determination was affirmed by the intermediate appellate court on a different ground, *viz.*, that the presence of the girl's four brothers was not reasonably foreseeable to the defendant. It was not reasonable to expect the city, in its planning of an intersection, to foresee that an

RECENT NEW YORK DEVELOPMENTS—AWAY FROM *Tobin*?

Tobin stands today as the definitive statement of the law in New York regarding negligently inflicted psychic injury to a bystander. There are significant signposts, however, which indicate that the situation in New York may not be static and immutable. Two 1975 decisions by the New York Court of Appeals indicate a more tolerant attitude toward the plaintiff who has suffered psychic injury.[155]

In *Wolfe v. Sibley, Lindsay & Curr Co.*,[156] decided in May 1975, the plaintiff had suffered an acute depressive reaction when, after being instructed by her emotionally troubled supervisor to summon the police, she entered his office and found him lying in a pool of blood caused by a fatal self-inflicted gunshot wound in the head. The plaintiff's condition required her hospitalization, and she subsequently claimed workmen's compensation benefits for an accidental injury suffered within the scope of her employment. The intermediate appellate court set aside an award by the Workmen's Compensation Board, holding that mental injury caused solely by psychic trauma is, as a matter of law, not compensable. The court of appeals reversed and permitted recovery by a "bystander"[157] who had suffered severe psychic injury resulting from the traumatic shock of observing the grievous physical injury of another. The language of the court is most illuminating:

> We hold today that psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury. . . . In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same — the individual is incapable of

injured pedestrian would have relatives nearby who would suffer emotional trauma. The California Supreme Court not only denied a hearing, but also ordered the appellate court's opinion excluded from the official reports. The effect of such a determination is speculative, but the case illustrates the breadth of the difficulties which can arise in a *Dillon* situation. This case and other post-*Dillon* decisions in California are discussed in Note, *Negligent Infliction of Mental Distress: Reaction to* Dillon v. Legg *in California and Other States*, 25 HASTINGS L.J. 1248 (1974).

[155] Johnson v. State, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975); Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975).

[156] 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975), *rev'g* 44 App. Div. 2d 739, 354 N.Y.S.2d 470 (3d Dep't 1974).

[157] Although the *Wolfe* court found that the plaintiff was not a bystander but an "active participant" in the event, 36 N.Y.2d at 511, 330 N.E.2d at 606, 369 N.Y.S.2d at 642, it is submitted that she was as much a bystander as the mother who witnesses negligent infliction of harm upon her child.

> functioning properly because of an accident and should be compensated under the Workmen's Compensation Law.[158]

The court concluded that there was nothing mandatory about the use of physical injuries as a means of corroborating psychic harm, as each is capable of being separately identified and established.[159] The court then directly confronted the controlling factor in *Tobin, viz.,* the fear that to allow recovery would leave the courts "with no rational way to limit liability."[160] Distinguishing *Tobin* on two grounds, the *Wolfe* court indicated that the tort concept of foreseeability is not relevant in a workmen's compensation case, and that the *Wolfe* claimant was not merely a third party witnessing injury to another, but rather was an active participant in the events surrounding her supervisor's demise.[161]

Such arguable distinguishing features, however, did not convince Chief Judge Breitel, the author of *Tobin,* who perceived as identical the issue raised in the two cases. Emphasizing the danger of unlimited liability enunciated in *Tobin,* the *Wolfe* dissent focused upon the idiopathic nature of one's vulnerability to psychic trauma. The variance in every person's preconditioned mental state and the possible effects of psychic trauma upon the mentally unstable are, according to Chief Judge Breitel, insurmountable obstacles to recovery.[162]

While *Wolfe* is a workmen's compensation case, the majority opinion clearly demonstrates a willingness to expand a party's rights to recover for psychic injury suffered as a result of witnessing injury to another,[163] despite the strenuous objection of the author of the *Tobin* opinion.

A second development in this area is even more fascinating. Barely two months after the *Wolfe* decision, the same court in *Johnson v. State,*[164] unanimously allowed recovery by a daughter who had been negligently and erroneously advised by a hospital that

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[158] 36 N.Y.2d at 510, 330 N.E.2d at 606, 369 N.Y.S.2d at 641.

[159] *Id.* at 510, 330 N.E.2d at 606, 369 N.Y.S.2d at 642.

[160] *Id.* at 511, 330 N.E.2d at 606, 369 N.Y.S.2d at 642.

[161] *Id.*, 330 N.E.2d at 606-07, 369 N.Y.S.2d at 642.

[162] *Id.* at 511-14, 330 N.E.2d at 607-08, 369 N.Y.S.2d at 643-45 (Breitel, C.J., dissenting).

[163] In Shaner v. Greece Central School Dist., 51 App. Div. 2d 662, 378 N.Y.S.2d 185 (4th Dep't 1976), the Appellate Division, Fourth Department, denied recovery for emotional distress suffered by the plaintiff when her brother was allegedly "negligently allowed" to commit suicide by the defendant. The *Shaner* court found that the plaintiff's reliance on *Wolfe* was unfounded, not because it involved workmen's compensation recovery, but because *Wolfe* permitted recovery by an active participant rather than a witness.

[164] 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975).

her confined and ailing mother had passed away. No physical injuries were alleged, and the court noted the general rule that in the absence of contemporaneous or consequential physical injury, no recovery is allowed for negligently caused psychological trauma which results in emotional harm alone. The two recognized exceptions to this rule[165] were inapplicable, but the court concluded that a third exception should be made in this case because the daughter had been *directly* injured by the defendant's negligence:

> Claimant was not indirectly harmed by injury caused to another; she was not a mere eyewitness of or bystander to injury caused to another. Instead, she was the one to whom a duty was directly owed by the hospital, and the one who was directly injured by the hospital's breach of that duty. Thus, the rationale underlying the *Tobin* case, namely, the real dangers of extending recovery for harm to others than those directly involved, is inapplicable to the instant case.[166]

Two noteworthy developments appear in the *Johnson* case. First, the court unanimously recognized that the Cardozo zone of danger test is not limited to a circumscription of geographical boundaries within which physical injury may occur, but can be extended indefinitely to encompass the infliction of psychic harm:

> [T]he serious psychological impact on claimant of a false message informing her of the death of her mother . . . [was] within the 'orbit of the danger' and therefore within the 'orbit of the duty' for the breach of which a wrongdoer may be held liable. Thus, the hospital owed claimant a duty to refrain from such conduct, a duty breached when it negligently sent the false message.[167]

If the zone or orbit of danger is so malleable, it is submitted that it is no extension thereof to include in such a zone the Parent

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[165] These two exceptions permit recovery for negligent transmission of a telegram announcing death, *see, e.g.*, Western Union Tel. Co. v. Redding, 100 Fla. 495, 129 So. 743 (1930), and for negligent mishandling of a corpse, *see, e.g.*, Dunahoo v. Bess, 146 Fla. 182, 200 So. 541 (1941). According to Dean Prosser, "[t]here may perhaps be other such cases." W. PROSSER, LAW OF TORTS § 54, at 330 (4th ed. 1971).

[166] 37 N.Y.2d at 383, 334 N.E.2d at 593, 372 N.Y.S.2d at 643 (1975). Chief Judge Breitel, who authored the opinion in *Johnson*, parenthetically distinguished *Wolfe*, from which he had vigorously dissented: "Nor is *Matter of Wolfe v. Sibley, Lindsay & Curr Co.* relevant to the tort rationale or holding in this case. There recovery was allowed solely on the elastic basis permitted by the Workmen's Compensation Law as applied in the courts." *Id.* (citation omitted). The court did not deem it significant that the erroneous message had not been sent to the plaintiff daughter, but rather to the mother's sister, who then relayed the information to the daughter. The facts do not indicate why the aunt's cause of action was dismissed without appeal.

[167] *Id.* at 382-83, 334 N.E.2d at 593, 372 N.Y.S.2d at 642 (citation omitted).

in the Stated Hypothetical who sees his child run over. As the *Johnson* court stated, for one to be held liable in negligence, "it is enough that he be aware of the risk of danger."[168] If Parent in the Stated Hypothetical is within the foreseeable orbit of danger, then Parent is within the orbit of duty *"for the breach of which a wrongdoer may be held liable."*[169]

Secondly, the necessity of resultant physical injury was minimized. The *Johnson* court stated: "The false message and the events flowing from its receipt were the proximate cause of claimant's emotional harm. Hence, claimant is entitled to recover for that harm, especially if supported by objective manifestations of that harm."[170] The word "especially" seems to indicate that the existence of physical injury, although helpful, is not necessary for recovery. Moreover, the use of the term "objective manifestations" may indicate that no actual physical injury need be shown, but rather that any physical conduct or behavior which would be corroborative of the alleged psychic injury will suffice. Chronic nausea, continual headache, insomnia, nightmares, rash, muteness, violent behavior, and other outward manifestations of psychic injury immediately come to mind as possibly satisfying the criterion of "objective manifestation."

Read together, the *Wolfe* and *Johnson* decisions indicate that the New York Court of Appeals has by no means regressed on the issue of psychic harm, but rather is progressing on a case-by-case basis, not unlike the manner proposed in *Dillon*. The court of appeals is attempting to formulate a reasonable and just attitude toward tortfeasors and victims alike where the harm complained of has a psychic trauma as its origin. While it is by no means clear that the *Tobin* rule of nonliability for psychic injury negligently inflicted upon a bystander will be overruled, it does appear that there may be room for movement toward allowing recovery in certain limited cases where the risk of psychic injury is manifest, the orbit of danger (and thus the duty) is reasonably perceptible, the victim's presence is foreseeable and the psychic injury proximately results from the tortfeasor's conduct and is supported by a "guarantee of genuineness," such as some objective manifestations thereof. There are several cases pending in the New York courts which raise this or a

[168] *Id.* at 382, 334 N.E.2d at 593, 372 N.Y.S.2d at 642.

[169] *Id.* at 383, 334 N.E.2d at 593, 372 N.Y.S.2d at 642 (citation omitted) (emphasis is added).

[170] *Id.* at 383, 334 N.E.2d at 593, 372 N.Y.S.2d at 642.

closely related issue, and the high court may have an opportunity to address this question in the not too distant future.[171]

CONCLUSION

Recovery by a bystander for psychic injury which results from witnessing the negligent infliction of bodily harm upon another is an idea whose time has arrived, at least when the three *Dillon* prerequisites have been met and when the presence of the injured party and the likelihood of psychic injury are reasonably foreseeable by the tortfeasor. This is not a new cause of action, but is rather an extension of the negligence cause of action long recognized by the common law.[172] The most significant reasons for judicial reluctance to allow recovery have all but evaporated: psychic injury is not necessarily too remote nor too speculative, although in some cases it may be; such liability is not potentially unlimited if the risk of psychic injury to the victim must be reasonably foreseeable by the tortfeasor; and the administrative impediments to liability, such as the potential flood of litigation and the possibility of spurious claims, have been removed by the principal concern of the law to see that justice is done. Moreover, physical injury is not an essential element of psychic harm, and the requirement therefor should not be retained where the psychic harm can be independently established.

In sum, there is no sound argument why Parent in the Stated Hypothetical should be denied recovery, although that result would theoretically obtain in New York if the *Tobin* rationale were today strictly applied. The recent *Wolfe* and *Johnson* cases make such a result less likely and indicate that a reevaluation of the entire troublesome area of psychic injury is taking place in New York.

In this era of assessing liability without fault,[173] should liability be denied when fault has been established? In *Tobin,* the court said "[w]hile it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this

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[171] *E.g.,* Shanahan v. Orenstein, 52 App. Div. 2d 164, 383 N.Y.S.2d 327 (1st Dep't 1976).

[172] *But see* Tobin v. Grossman, 24 N.Y.2d 609, 613, 249 N.E.2d 419, 421, 301 N.Y.S.2d 554, 556 (1969).

[173] *See, e.g.,* Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975), *discussed in The Survey,* 50 ST. JOHN'S L. REV. 179, 181 (1975) (strict products liability); N.Y. INS. LAW §§ 671-73 (McKinney Supp. 1976) (Comprehensive Automobile Insurance Reparations Act, otherwise known as the "No-Fault" Automobile Accident Compensation Law).

world."[174] It is submitted that the realities of this world, at this time, indicate that liability should be imposed under the limitations described herein.

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[174] 24 N.Y.2d at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561. Compare the *Tobin* statement with that contained in Lambert v. Brewster, 97 W. Va. 124, 138, 125 S.E. 244, 249 (1924): "As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."